

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 26, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 02-2030
STATE OF WISCONSIN**

Cir. Ct. No. 01-CV-3314

**IN COURT OF APPEALS
DISTRICT IV**

NOS COMMUNICATIONS, INC.,

PETITIONER-APPELLANT,

V.

PUBLIC SERVICE COMMISSION OF WISCONSIN,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
JOHN C. ALBERT, Judge. *Affirmed.*

Before Roggensack, Deininger and Lundsten, JJ.

¶1 LUNDSTEN, J. NOS Communications, Inc. appeals an order of the circuit court affirming the Public Service Commission's decision which denied NOS Communications' petition for continued certification as a reseller of telecommunications services. NOS argues that the Commission's decision to revoke NOS's license should be reversed for several reasons: (1) pursuant to WIS.

STAT. § 227.57(7) (1999-2000),¹ because it is contrary to the evidence, and pursuant to § 227.57(8), because it is arbitrary and capricious; and (2) pursuant to § 227.57(4), because the Commission's decision violated NOS's right to due process by (a) revoking NOS's license based on grounds not contained in the notice provided to NOS and (b) wrongfully denying NOS's request for a hearing. We disagree with all of NOS's arguments and affirm.

Background

¶2 NOS Communications is a telecommunications utility reseller subject to the rules issued by the Commission. Under the Commission's regulations, telecommunications utility resellers must notify the Commission within twenty days when they adopt new doing-business-as names. It is undisputed that NOS adopted the following five doing-business-as names, which are listed with the date of first use, as filed with the secretary of state:

1. International Plus (May 4, 1999)
2. 011 Communications (September 27, 1999)
3. INETBA (November 12, 1999)
4. The Internet Business Association (November 12, 1999)
5. iVANTAGE Network Solutions (February 21, 2000)

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

It is also undisputed that NOS did not notify the Commission of its adoption of any of these five doing-business-as names within twenty days.

¶3 In a letter dated February 1, 2001, NOS notified the Commission for the first time that it had adopted the new doing-business-as names listed above. On March 30, 2001, NOS filed its annual report with the Commission. The annual report did not disclose any of NOS's doing-business-as names.

¶4 On May 4, 2001, the Commission initiated a proceeding to revoke NOS's certification and notified NOS of its intention. The notice required NOS to file a written petition for continued certification containing any corrective action taken and an indication whether "a hearing is requested or waived." The notice stated that the proceeding was initiated in response to NOS's "failure to notify the Commission of change in its marketing [doing-business-as] names within 20 days of such changes or to include information on [doing-business-as] names in the annual report." NOS submitted a petition for continued certification listing all of its doing-business-as names and requesting a hearing. The petition also indicated that the Wisconsin Department of Justice had served a summons and complaint on NOS and that NOS was currently involved in negotiations with the DOJ to resolve any concerns. The petition also referenced an investigation proceeding by the Federal Communications Commission without detailing that investigation.

¶5 On June 13, 2001, the Commission requested a supplemental filing to address issues raised with regard to the business purpose for the use of the multiple doing-business-as names. In addition, the Commission requested that NOS address the FCC and DOJ allegations by explaining the billing methods used by NOS. In its supplemental filing, NOS responded to the Commission's requests and renewed its request for a hearing "to be certain that all information required by

the Commission has been provided, and so that any questions the Commission has may be responded to in such detail as the Commission requires.”

¶6 On July 19, 2001, the Commission received an internal memorandum regarding NOS’s petition for continued certification. The memorandum stated that the DOJ had filed a lawsuit against NOS alleging that NOS “has been deceptively marketing their services to Wisconsin customers” and “us[ing] multiple [doing-business-as] names to escape the ill will of NOS customers engendered by deceptive marketing practices.” The memorandum also acknowledged receipt of NOS’s petition and supplemental filing and, in regard to NOS’s request for a hearing, stated that NOS “in its petition, supplemental filing, and conversations with commission staff did not indicate that it wished to present information not already presented in the petition.”

¶7 The Commission denied NOS’s request for a hearing and revoked NOS’s certification. The Commission found that the information presented by NOS was sufficient to make its decision. The Commission found that NOS’s failure to notify the Commission of its adoption of doing-business-as names within twenty days or to report those adoptions in its annual report “exhibit[s] a pattern of disregarding PSC rules.” The Commission further found that there was a “direct relationship between the violation of the PSC rules on filing of name changes” and the allegations that NOS employed new doing-business-as names in order to escape the ill will engendered by NOS’s deceptive marketing practices. The Commission concluded that NOS’s “practice of using multiple [doing-business-as] names without notifying the PSC is egregious notwithstanding subsequent notification after the commencement of revocation and consequently, the Commission finds NOS ineligible for continued certification.” The Commission

made other findings of fact and conclusions of law pertaining to NOS's method of billing Wisconsin consumers.

¶8 NOS petitioned for judicial review of the Commission's decision to the circuit court. The circuit court affirmed the Commission's decision.

Discussion

¶9 When reviewing an agency's action, a court must affirm the agency's decision "[u]nless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of [WIS. STAT. § 227.57]." WIS. STAT. § 227.57(2). "Sections 227.57(4)-(8) list instances where a reviewing court may set aside or modify an agency action or remand the case to the agency for further action, keeping in mind that due weight is accorded to the agency's decision." *Sterlingworth Condo. Ass'n, Inc. v. DNR*, 205 Wis. 2d 710, 720-21, 556 N.W.2d 791 (Ct. App. 1996). NOS urges reversal of the Commission's actions under three subsections—§ 227.57(4), (7), and (8).

Whether the Commission's Decision to Revoke NOS's License Was Contrary to the Evidence in the Record or Was Arbitrary and Capricious

¶10 NOS argues that the Commission's decision was contrary to the record, as well as arbitrary and capricious, because NOS remedied its technical violations.

¶11 Before we address NOS's arguments, we note that NOS concedes that it violated the Commission's rules pertaining to use of doing-business-as names. Within twenty days of adopting a new name under which it does business, telecommunications utility resellers must notify the Commission in writing of the new name. WIS. ADMIN. CODE §§ PSC 168.10(1)(a) and 168.06(2)(b). In

addition, a telecommunications utility reseller must file an annual report with the Commission including, among other things, the adoption of any doing-business-as names. WIS. ADMIN. CODE § PSC 168.12(1)(b). A violation of either WIS. ADMIN. CODE §§ PSC 168.10(1)(a) or 168.12(1)(b) constitutes grounds upon which the Commission may revoke a telecommunications utility reseller's certification. WIS. ADMIN. CODE § PSC 168.13(1).² It is undisputed that NOS violated WIS. ADMIN. CODE § PSC 168.10(1)(a) five times by adopting new doing-business-as names without timely notifying the Commission and that NOS violated WIS. ADMIN. CODE § PSC 168.12(1)(b) by not including its new doing-business-as names in its annual report filed with the Commission.

¶12 Notwithstanding its violations, NOS argues that the Commission's order is contrary to the record and should be overturned pursuant to WIS. STAT. § 227.57(7).³ NOS claims that because it registered its doing-business-as names with the secretary of state, notified the Commission of its adoption of doing-business-as names in the February 1, 2001, letter, and notified the Commission in subsequent filings, the Commission's finding that NOS failed to provide the

² WISCONSIN ADMIN. CODE § PSC 168.13(1) provides, in relevant part:

Certification of a reseller may be revoked under the procedure in sub. (2) for any of the following reasons:

(a) Failure to file a substantially complete annual report required by s. PSC 168.12.

(b) Failure to comply with any applicable provision of this chapter or of ch. 196, Stats.

³ WISCONSIN STAT. § 227.57(7) provides: "If the agency's action depends on facts determined without a hearing, the court shall set aside, modify or order agency action if the facts compel a particular action as a matter of law, or it may remand the case to the agency for further examination and action within the agency's responsibility."

Commission with notice of its adoption of doing-business-as names “is directly contrary to the evidence.” This argument is a non-starter because NOS concedes that it violated the Commission’s rules, thereby providing sufficient grounds on which to revoke NOS’s certification. We reject the argument that NOS’s attempts to remedy its violations compel a different action as a matter of law. Attempts to remedy errors after the fact cannot erase the existence of the violations.

¶13 NOS next argues that the Commission’s decision to revoke its certification was arbitrary and capricious because NOS’s errors were simply technical violations and NOS substantially remedied the errors. An allegation that the Commission acted arbitrarily and capriciously is an allegation that the Commission acted “outside the range of discretion delegated to the agency by law.” WIS. STAT. § 227.57(8). “We may not substitute our judgment for that of the commission on an issue of discretion; rather, we review the commission’s decision to determine whether it is arbitrary or capricious.” *Wisconsin Prof’l Police Ass’n v. PSC*, 205 Wis. 2d 60, 73-74, 555 N.W.2d 179 (Ct. App. 1996). An agency’s decision is not arbitrary or capricious if it is rational. *See id.* at 74. An agency’s decision is “capricious if it is so unreasonable as to ‘shock the sense of justice and indicate lack of fair and careful consideration.’” *Westring v. James*, 71 Wis. 2d 462, 476-77, 238 N.W.2d 695 (1976) (quoting *Scharping v. Johnson*, 32 Wis. 2d 383, 390, 145 N.W.2d 691 (1966) (citations omitted)). The supreme court has stated: “It is our considered conclusion that penalties, which are imposed by administrative agencies that are so harsh as to shock the conscience of the court, constitute ‘arbitrary’ action” *Lewis Realty, Inc. v. Wisconsin Real Estate Brokers’ Bd.*, 6 Wis. 2d 99, 125, 94 N.W.2d 238 (1959).

¶14 NOS contends that the Commission’s decision was arbitrary and capricious because “[t]here is no other case in the Commission’s long history

where a telecommunications reseller has been decertified for such a technical, temporary and minor transgression.” NOS characterizes the Commission’s action as “extreme, unreasonable and irrational,” especially in light of NOS’s corrective actions. NOS contends that it substantially corrected its errors by notifying the Commission of its adoption of doing-business-as names in a letter to the Commission dated February 1, 2001, and in correspondence to the Commission after the Commission issued its notice of proceeding to revoke certification.

¶15 The error in NOS’s reasoning is that there is no “substantial compliance” exception for violations of WIS. ADMIN. CODE § PSC ch. 168. The Commission found that NOS committed several violations of its rules, acknowledged receipt of NOS’s attempts to remedy the violations, and determined that NOS’s conduct was “egregious notwithstanding subsequent notification after the commencement of revocation [proceedings].” Given the Commission’s duty to protect the public and the Commission’s concern that adoption of doing-business-as names without notification could be used to harm consumers by escaping the ill will engendered by bad conduct, the Commission’s conclusion is rational. NOS failed to notify the Commission of its doing-business-as name adoptions five times within a ten-month span. After it attempted to remedy the error in its February 1, 2001, letter, NOS then failed to report the name adoptions in its annual report. Certainly, NOS exhibits a pattern of disregard for the Commission’s authority. More importantly, NOS does not demonstrate why the Commission’s decision “shock[s] the conscience of the court.” *Lewis Realty*, 6 Wis. 2d at 125.

Whether NOS's Due Process Rights Were Violated

¶16 NOS contends that its due process rights were violated because the Commission's order revoking NOS's certification relied on grounds not contained in the notice of the revocation proceeding and the Commission reached its decision without providing NOS an opportunity to be heard. "Whether a party in an administrative proceeding has received due process is a question, like the extent of the agency's jurisdiction and powers, which we review *de novo*, owing no deference to the agency's decision." *Wright v. LIRC*, 210 Wis. 2d 289, 296, 565 N.W.2d 221 (Ct. App. 1997). In our review of an agency decision, this court "shall remand the case to the agency for further action if it finds that either the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procedure." WIS. STAT. § 227.57(4).

¶17 According to NOS, the Commission's order contains several findings of fact pertaining to subjects other than NOS's adoption of doing-business-as names, including pending actions against NOS by the FCC and the Wisconsin Department of Justice and irregularities in NOS's billing practices. NOS quotes *Bracegirdle v. Department of Regulation & Licensing*, 159 Wis. 2d 402, 464 N.W.2d 111 (Ct. App. 1990), which states: "Fundamental fairness ... require[s] that [an agency] decide [a person's] 'guilt' or 'innocence' of the charges against [him or her], not charges based on the [agency's] interpretation ... announced for the first time in its decision." *Id.* at 418. NOS contends that the Commission's order revoking certification should be reversed because that order relied on transgressions not identified in the notice of the revocation proceedings.

¶18 The Commission agrees that it must adequately apprise companies of the reasons for revocation, but contends, and we agree, that NOS received sufficient notice in this case. Initially, NOS received notice about errors in its adoption of doing-business-as names. After NOS discussed pending charges by the Wisconsin DOJ and the FCC in its petition for continued certification, the Commission requested additional information about those charges and NOS's billing practices. Based on NOS's petition and supplemental filings, NOS cannot now claim that it had no notice of the reasons for revocation. Moreover, agencies are entitled to "a presumption of regularity," *Ashleson v. LIRC*, 216 Wis. 2d 23, 34, 573 N.W.2d 554 (Ct. App. 1997), and we assume they act in accord with the law. The Commission relied on the adoption of doing-business-as names as the basis for its decision: "The Commission finds that NOS' practice of using multiple [doing-business-as] names without notifying the PSC is egregious notwithstanding subsequent notification after the commencement of revocation and consequently, the Commission finds NOS ineligible for continued certification." The presence of the DOJ charges simply provided a rationale for how violations of the Commission's rules on notification of adoption of doing-business-as names could harm the public. There is no evidence that the Commission relied on the validity of the DOJ's allegations as the basis for its decision.

¶19 In a separate argument, NOS maintains that its due process rights were violated because its request for a hearing was denied. NOS contends that it is entitled to a hearing pursuant to WIS. STAT. §§ 227.42(1) and 227.44(1) and WIS. ADMIN. CODE § PSC 168.13(2). According to NOS, it is entitled to a hearing under §§ 227.42(1) and 227.44 because it meets the requirements under § 227.42(1) and because the action to revoke its certification is a "contested case"

under § 227.44. NOS further argues that because WIS. ADMIN. CODE § PSC 168.13(2) permits parties to either request a hearing or waive their right to a hearing, parties have a legal right to a hearing under the regulation.

¶20 We do not reach the question of whether the Commission correctly denied NOS’s request for a hearing because we conclude that error, if any, was not “material error.” Recall that in our review of an agency decision, this court “shall remand the case to the agency for further action if it finds that either the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procedure.” WIS. STAT. § 227.57(4). Thus, not every procedural error is automatically grounds for remand. Rather, the party alleging error must demonstrate that it was prejudiced by the alleged error. *See, e.g., Responsible Use of Rural and Agric. Land (RURAL) v. PSC*, 2000 WI 129, ¶63, 239 Wis. 2d 660, 619 N.W.2d 888; *Seebach v. PSC*, 97 Wis. 2d 712, 724, 295 N.W.2d 753 (Ct. App. 1980) (“Agency action will not be upset because of harmless error.”). The burden is on the party appealing an agency decision “to establish that a claimed procedural error is prejudicial.” *RURAL*, 239 Wis. 2d 660, ¶48.

¶21 NOS asserts that ““it is not harmless error for an agency to disobey its procedural regulations,”” quoting *State ex rel. Anderson-El v. Cooke*, 2000 WI 40, ¶21, 234 Wis. 2d 626, 610 N.W.2d 821. NOS argues that a hearing “affords the licensee the opportunity to present mitigating evidence showing that it should retain its license despite an alleged rule violation.” NOS concludes that “[w]ithout a hearing, NOS was precluded from gathering evidence from the Commission to show that the Commission’s business death sentence—decertification—was grossly disproportionate to NOS’s alleged failing when compared to the acts, errors and omissions of other telecommunication companies.”

¶22 However, NOS does not demonstrate how it was unable to gather evidence from the Commission or present mitigating evidence. NOS stated that the only reason it wished to have a hearing was to ensure that the Commission received its submissions and to answer any questions that the Commission may have. The Commission indicated that it received NOS's submissions and had no questions. NOS does not allege that it was prevented from presenting relevant and persuasive evidence because of the lack of a hearing. We conclude that, even if NOS was erroneously denied a hearing, there was no "material error" because NOS has not met its burden to prove that it was prejudiced by the lack of a hearing.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

